

Transparency in the U.S.

Towards Worldwide Access to Government

The United States has championed the transparency efforts that are central to global governmental reforms and targeted anti-corruption programs. While expectations that the United States will always lead by example remain high, we know from the 2000 presidential election that even where the United States is the first to oversee the integrity of processes in other countries, our own system could benefit from the recommendations, standards, and refinements we offer to others.

While specific reform efforts—from accountability, elections, and human rights—are important considerations to the country which remains the greatest democracy in the world, the ability of the United States to lead by example, is best measured by its historic ability to self-correct. Indeed, the most visible test today is the highly focused and critical work of several entities to identify and correct the flaws of state-based voting procedures and processes that will be addressed by Congress in the very near future.

Central to the capacity to self-correct are several factors. In today's world, the economic strength of the United States and the federal government remain critical to its success. In the electronic age, however, there is a new standard—the way in which our nation's traditional institutions operate in conjunction with the advances in technology. From the standpoint of accountability and openness, the greatest revolution of electronic technology is the speed, quality, and quantity of information access and dissemination.

If we stop to examine the fundamentals of our democracy in the electronic information age certain fundamental questions arise. Does the United States Constitution ensure accountability? Do the laws promulgated in response to needs and events allow the democracy to adapt and improve itself? Do our leaders and the institutions that they lead reflect an understanding of how the world is changing?

Principles of Democracy in the Electronic Information Age

In a democracy, citizens are the governors and the governed. Nothing is more essential to the concept of self-governance than access to government information. Yet, the pathways for access have been shaped historically into a maze of channels, created by none other than citizens at the controls of our own democratic government. People are not the only ones lost in this maze. It obscures the central importance of openness —of transparency—to the fur-

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therance of democratic ideals. Does the United States have a blueprint for transparency, or does it need a new one?

Where information is not disclosed to the public, government has failed to exercise the best means of maintaining public trust and dispelling distrust. When government activity is conducted in secret with the intent of preventing public opinion from mobilizing, it virtually ensures that once mobilized, public opinion will oppose the activity.

The Constitutional Solution

It is difficult to disagree with the ethic of public trust in a democracy, and it may seem most evident that the blueprint for transparency we need already exists in the United States Constitution. After all, the Constitution establishes the three branches of government, serves to elect, as Abraham Lincoln described it, a “government of the people, by the people,” and amply empowers Congress with authority to provide “checks and balances,” as James Madison described it, over the executive branch. Indeed, it would also appear that the First Amendment guarantees the interaction and disagreement by the governed with the governors. This is not limited to the freedoms of speech and association, but importantly includes the right to petition government for change. The latter would assume that in order to seek change, the citizenry must not only know what direction they would prefer the government to move towards, but also have sufficient information to understand the processes. However, while the Constitution provides an invaluable and irreplaceable governing framework, it does not prescribe the outcomes of the business of government.

Looking more closely, the drafters of the Constitution grasped the need and desired the advantage of secrecy. Article One allows Congress to keep a secret journal and contains the immunity clause that prevents Members of Congress from being questioned about their legislative activities outside of the Congress. Transparency is not guaranteed by the Constitution. In fact, transparency can only be ensured if elected representatives recognize and embrace the inherent value of transparency.

Technology and Transparency

The framers of the Constitution could not have anticipated the changes in our country or the world, the growth and cost of our government, or the myriad difficulties of realizing self-government. Nor could they have ever imagined the revolution in information technology that has transformed society into information hungry masses that, together with the ease of implementation and access to such technology, have rapidly transformed how government conducts business. This includes many aspects of releasing valuable knowledge and services to the public. The speed and extent to which Internet technology and the World Wide Web have been integrated into government would

shock even the most ardent reformer with its enhancements to the quality and effectiveness of our government.

Today, judging from the breadth of Internet access to government, borderless worldwide access, it would appear that transparency has become the emblem of every government office. Click on the government’s own gateway at FirstGov (www.firstgov.gov), or individual Web sites from the White House (www.whitehouse.gov) to the Pentagon (www.defenselink.mil). On Capitol Hill, you can find the House of Representatives (www.house.gov) and the United States Senate (www.senate.gov) with information and links to every elected Member of Congress and all the committees and subcommittees. Email systems further enhance the permeability of these once imposing and walled off public institutions. A wealth of other private and public sector sites are available, some appearing to more effectively leverage value from changes in government information law than the government itself. Even the term “efoia” has been trademarked (see, www.efoia.com).

The accountability and information agencies, and their reports and documents, are also accessible on the Web. These include the General Accounting Office (www.gao.gov) and the National Archives and Records Administration (www.nara.gov), and the Inspectors General across government (www.ignet.gov).

The access and availability of Congress and federal departments and agencies through the World Wide Web is a welcome largess of information and services, and a boost to government in the sunshine. While some sites are what web designers merely call “brochureware”, others truly advance the public missions—not just the public relations mission—of our government. Transactions are conducted more efficiently (from procurement to passports) and computer technology creates stronger systems for tracking and storing information.

Transparency, however boosted by new technology, information systems, and public demand for electronic information, requires the effective operation of many longstanding laws, regulations, and programs governing the accountability of the federal government—“regardless of form or format.” The Constitution may be considered an early framework, but it remains the foundation on which to build. Is there a commitment of Congress to the checks and balances system? Does the executive order on security-classified information ensure proper information management, access, and dissemination? Are the Freedom of Information Act and the Privacy Act properly and effectively administered?

Executive Branch Concerns

The Executive Branch has historically been the greatest source of difficulty and struggle, yet its authority, structure, and processes are relatively easy targets for prescription, but remain difficult to compel and monitor.

In 1997, the congressionally chartered Commission on Protecting and Reducing Government Secrecy detailed the

looming declassification problem. The Commission's final report stated that "over 1.5 billion pages of records 25 years old and older are still classified by the Federal Government. Of this amount, agencies currently plan to review less than one-half—approximately 719 million pages—under the automatic declassification provisions of the Order, meaning that agencies are exempting from automatic declassification over three quarters of a billion pages." (see, <http://www.dss.mil/seclib/govsec/secretcy.htm>) An executive order was issued under the Clinton Administration revising the security classified information procedures and standards, including strengthening the declassification requirements.

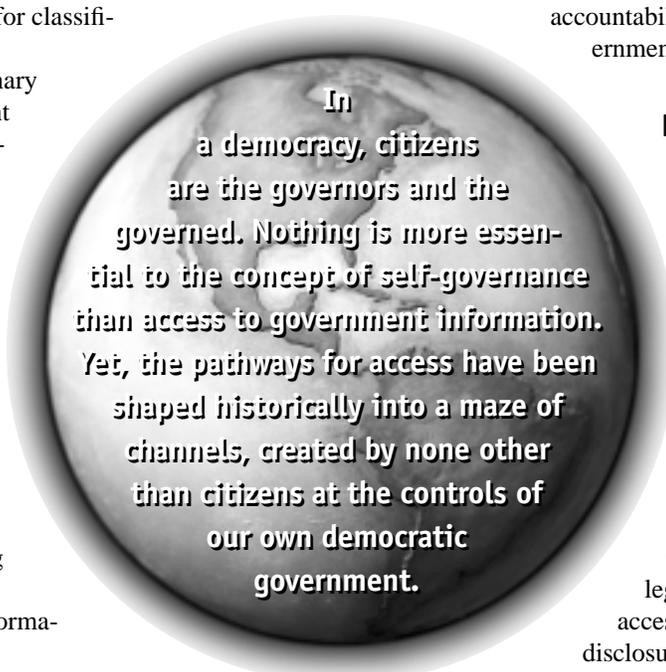
If a new executive order is issued under the Bush Administration on security classified information it should consider:

- Narrowing the criteria for classification
- Reducing the discretionary authority of government personnel for classification
- Reducing the volume of classified information
- Placing equal emphasis upon classification and declassification
- Creating, maintaining, and monitoring schedules for systematic declassification
- Retaining the balancing test for the public's interest in access to information against the need for classification
- Retaining administrative appeals program established to enable the public to seek an independent review of a request for classified information that has been declined
- Eliminating authority for reclassification
- Creating greater accountability and information security management standards for all classified information including compartmentalized and special access programs.

Also symptomatic of the effects of longstanding problems of the classification system has been the need for statutes targeting subject specific agency records. Costly, yet prodigious, these efforts have released millions of pages of material and led to new and often innovative oversight panels in areas including: the President John F. Kennedy Records Collect Act, radiation victims of government test-

ing and mining, and Nazi and Japanese War Crimes, as well as Holocaust assets.

However, these extensive reforms and records access efforts do not necessarily address the day-to-day needs of the audit and investigative work of the Inspectors General of the executive branch agencies, or the similar needs of the General Accounting Office in the legislative branch. There, information access is only part of the problem. The human capital needs of these offices throughout the accountability community must receive serious attention in order to function optimally. Indeed, as Congress has taken steps to reduce either the sheer population of federal workers, they have increased the responsibility of the Inspectors General with regard to government wide financial accountability, and as a result of both reductions and contracting-out policies, have increased the difficulty of contractor accountability in their performance of governmental functions.



Legislative Branch Concerns

Congress serves as one of the best examples of where Internet technology provides more direct access and the appearance of a closer link of government to the public, but belies a troubled transparency mission. The forcefulness of the Internet as a disclosure and reform mechanism continues in Congress, notably with the recent introduction of legislation to provide Internet access to committee transcripts, gift disclosure reports, lobbying reports, and Congressional Research Service reports.

In general, however, nowhere has the potential for achieving "checks and balances" to strengthen transparency been more dramatically underserved than in Congress. Congress is an institution, but one not well organized, and reducing its commitment to oversight and accountability has diminished its strength as an institution. The impact on access to government information, whether extracted and reported on by Congress, or sought privately and directly from federal agencies, has been significant. It is the very lapse in this regard, that has diminished the public's understanding of the fundamental role played by Congress in freedom of information matters.

Despite the need to examine the implementation of new laws, ranging from the electronic amendments to the Freedom of Information Act to the qualifications of the Chief Information Officers, little oversight has prevailed. There has not been a hearing on the administration of the

Freedom of Information Act since 1996. Efforts to broaden the criminalization of leaks of intelligence information have been pursued with a crisis fervor. Ironically, these have been sought at the same time that some of our government's intelligence and counterintelligence agents have continued to sell valuable secrets in the face of espionage laws that carry the death penalty.

In the case of Congress, it is not only the need to attend to the laws that in many cases have already been written as a blueprint for transparency, but interpreted as a blueprint for secrecy. Congress must fulfill the checks and balances responsibilities of our Constitution in the exercise of its fundamental duties, including probing deeper to produce more information about government activities as part of the appropriations, authorization, and oversight functions.

One measure of the checks and balances capability of Congress is the gap between federal spending (i.e., executive branch programs) and congressional personnel (i.e., legislative branch oversight resources). In recent years, both the legislative branch and the executive branch have worked to achieve federal downsizing and consolidation goals. In Congress, this has included changes in the number, jurisdiction, and staff of committees and subcommittees. In the executive branch, since 1993, this has featured the reduction of the workforce by "377,000 full-time-equivalent employees" from the White House to the Department of Defense. Government-wide downsizing may also be affecting the resources that federal agencies choose to commit to handle

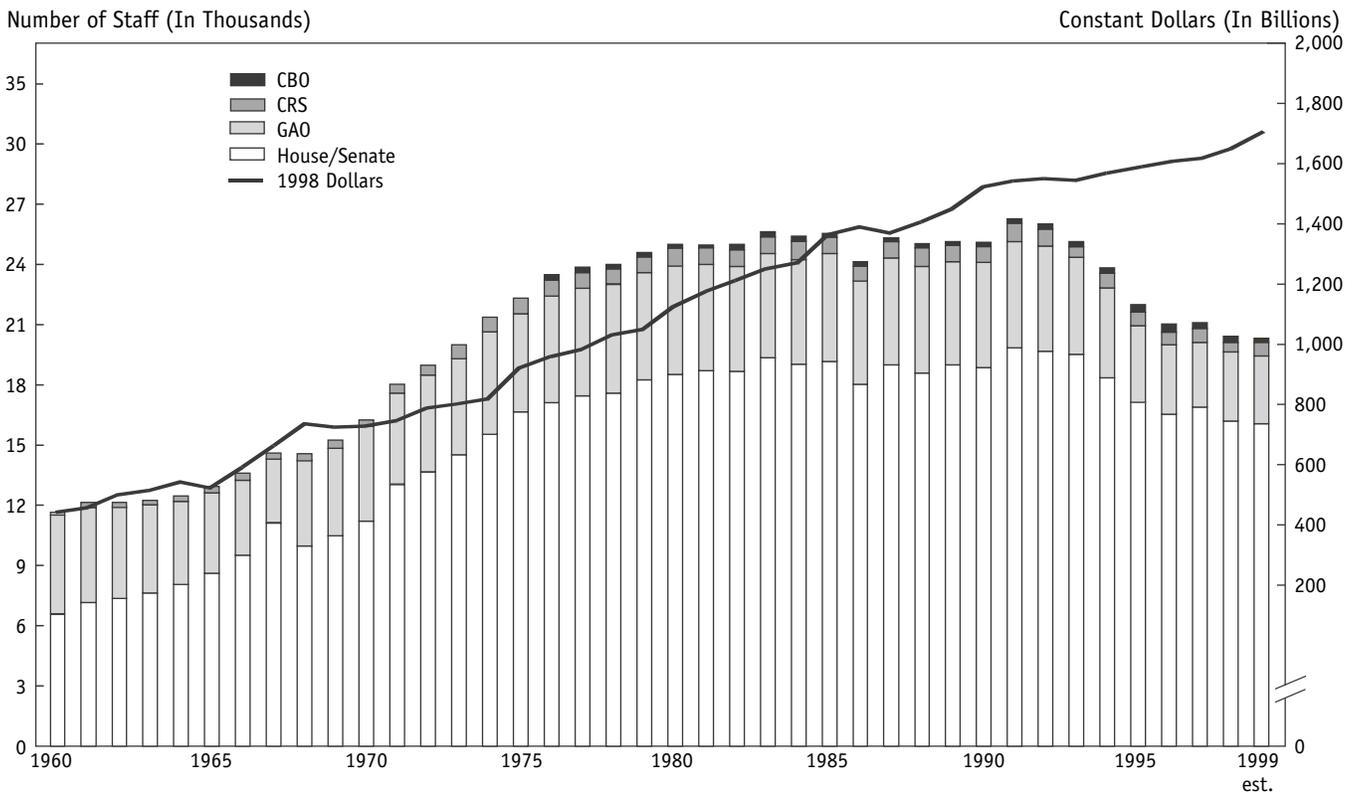
congressional requests for "real time audits" and other statutory reporting, including for military compartmentalized spending, as well as consolidated financial statements designed to create more transparency about federal agencies.

Overall, however, the gap between the *level of federal spending and the size of the congressional workforce* [including legislative branch support entities, such as the Congressional Budget Office (CBO), Congressional Research Service (CRS), and General Accounting Office (GAO)] has grown demonstrably.

In some cases, the gap is widened further where downsizing goals and increased demands on federal programs has led to a larger amount of "outsourcing" or "contracting out" of federal functions. The gap observable today reflects the need for a stronger checks and balances safety net to support the kind of accountability our democracy demands. The problem becomes all the more serious when considering how much more complicated the programs and issues affecting our nation and the world have become.

One consistent barrier to Congress, including its oversight capability through the General Accounting Office, is when it encounters difficulty in gaining access to Executive Branch information.

Throughout the Clinton Administration, it has been the politicization of the "power to probe," including by committees historically associated with strengthening transparency through oversight, investigation, and legislation that has instead heightened intrabranched tensions between



Congress and the Executive Branch. Information access by congressional committees has increasingly served as a fulcrum for investigations and partisan confrontations. In recent years such access battles signaled the first stage of congressional inquiries in such areas as:

- Health-care reform
- White House operations (travel office, security clearances)
- Federal intervention at the Branch Davidian compound in Waco, Texas
- Campaign finance
- Impeachment of the President of the United States

More recently, although the focus of the access battles has involved government policy making rather than ad hominem attacks, it has led to new battles between the Congress, along with its investigative arm, the General Accounting Office, and the new Administration. These access battles have included demands for the names of corporate executives who met with the Vice President regarding energy policy, as well as records of external meetings and proceedings on review of arsenic levels in water by the Environmental Protection Agency, and several other issues.

Probing in the absence of more substantive programmatic oversight, has fostered resistance throughout the government. Agencies are increasingly on the defensive, whether responding to a request directly from Congress or an investigative arm such as GAO, that information being

sought may be related to lurking congressional oversight or public relations problems for the agencies. Withholding the requested information is often viewed by agencies as a best defense. Indeed, key agencies, including the Departments of State and Defense, have formalized and restricted the availability of information by establishing policies or authorizing officials to block, or, politely, but indefinitely delay access to congressional overseers.

Congress needs to restore its commitment to the checks and balances function, and recognize that its own efforts to the contrary undermine the proper implementation of access laws on behalf of the public, and further hamper their own trustworthiness and transparency in the eyes of federal agencies and the public.

Conclusion

The United States has a new President, and the Congress has recently has experienced a power shift in the leadership of the United States Senate. Both would benefit from more closely examining lessons learned from the past where mistakes led to strengthened laws.

However, the laws alone, and the structural framework and obligations created are not always self-executing. What elected leaders and other government officials decide to do will have a critical impact on the quality of openness, transparency, and public trust among its own citizenry, and will resonate in the global community. 🏠